STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 1998
v	No. 190928 Macomb Circuit Court
CLARENCE SINGH WOODS, III, Defendant-Appellant.	LC No. 94-002989 FC

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

After a three-week trial, the jury convicted defendant of first-degree premeditated murder, MCL 750.316a; MSA 28.548(1), assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of felony firearm, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to mandatory life imprisonment on the first-degree murder conviction, fifteen years to life on the assault with intent to murder conviction, and two years' imprisonment on each felony-firearm conviction. Defendant appeals as of right. We affirm, but remand for resentencing on the assault conviction.

I

Defendant first argues that the trial court abused its discretion in admitting evidence that he committed an unrelated stabbing eighteen months earlier. We see no error.

The Michigan Rules of Evidence provide that evidence of other crimes, wrongs, or acts is not admissible to prove the character of an individual in order to show that the individual acted in conformity with his character. MRE 404(b). However, such evidence is admissible whenever it is relevant on a non-character theory, that is, the evidence is probative of something other than the person's criminal propensity. *People v VanderVliet*, 444 Mich 52, 65-66; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Defendant's principal defense at trial was insanity. The Michigan Supreme Court has held that "[t]estimony of prior arrests, convictions, assaultive and antisocial conduct, ordinarily completely inadmissible as bearing on the general guilt or innocence of the accused of the offense

charged, become material and admissible as bearing on the issue of his sanity." *People v Woody*, 380 Mich 332, 338; 157 NW2d 201 (1968). This Court has also held that evidence of a defendant's past conduct, not normally admissible, is admissible on the issue of sanity. *People v Cramer*, 97 Mich App 148, 161; 293 NW2d 744 (1980). Indeed, this Court has held:

> The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue. *People v Lipps*, 167 Mich App 99, 108-109; 421 NW2d 586 (1988) (quoting 2 Wigmore, Evidence (Chadbourn Rev), § 228, p 9).

The prosecution's introduction of defendant's conduct, though it was otherwise inadmissible as bearing on defendant's guilt or innocence, was admissible to rebut defendant's affirmative defense of insanity. The trial court properly instructed the jury in this regard. Therefore, we find no abuse of discretion.

II

Defendant next contends that he was denied the effective assistance of counsel by his attorney's failure to request the mandatory preliminary instructions on insanity and his attorney's failure to request an instruction on diminished capacity. Because defendant did not move for a new trial or *Ginther* hearing, our review of defendant's claim is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

MCL 768.29a(1); MSA 28.1052(1)(11) provides that when an insanity defense is presented, the trial court must give preliminary instructions to the jury on the definitions of mental illness, mental retardation and legal insanity immediately before the commencement of testimony on insanity in a jury trial. *People v Grant*, 445 Mich 535, 541-542; 520 NW2d 123 (1994). The failure to give such instructions is error regardless of a defendant's failure to request them. *Id*. However, failure to give preliminary instructions on insanity does not require automatic reversal. *Id*. at 543. Instead, like errors in final instructions to the jury, it is subject to a harmless-error analysis utilizing a prejudice standard. *Id*. at 543-544.

On this record, we find no prejudice to defendant. Defense counsel educated the jury on the meaning of mental illness and insanity during voir dire, during the testimony of his expert, and again in his closing. The trial court also clearly instructed the jury on mental illness and insanity. The crime itself was virtually uncontested. The entire defense rested on insanity and defense counsel made this clear throughout the trial. We cannot conclude that there was a reasonable probability that the jury, if given preliminary instructions on insanity, would have reached a different verdict.

It is also clear from the record that defense counsel made a strategic choice to focus on an insanity defense rather than a diminished capacity defense. This choice cannot be presumed error

simply because the strategy was ultimately unsuccessful. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Here, in light of all the circumstances, we cannot conclude that defense counsel's performance was outside the range of professionally competent assistance.[1]

III

Next, defendant maintains that the trial court abused its discretion in excluding evidence of prior treatment for major depression. We disagree. If a defendant in a felony case proposes to offer testimony to establish insanity at the time of the alleged offense as a defense, the defendant must file and serve notice upon the court and the prosecuting attorney of his intention to assert the defense of insanity not less than thirty days before the date set for trial. MCL 768.20a(1); MSA 28.1043(1)(1). If a defendant fails to give such notice, the statute states that the trial court must exclude the evidence offered by the defendant for the purpose of establishing insanity. MCL 768.21; MSA 28.1044. Despite the language of the statute, it has been interpreted to preserve the trial court's discretion to admit or exclude evidence, even where notice has not been filed. *People v Travis*, 443 Mich 668, 678-679; 505 NW2d 563 (1993).

Defendant claims that he was not required to list the psychiatrist witness on the notice because the evidence was not offered to prove defendant's state of mind at the time of the crime. However, defendant misstates the issue by focusing on his mental state at the time of the crime. In *People v Giuchici*, 118 Mich App 252, 263; 324 NW2d 593 (1982), we held that, although the language of MCL 768.21; MSA 28.1044 does not specifically require notice be given of the names of witnesses for defendant's insanity defense, such a requirement is implicit in the statute and necessary to give effect to the legislative intent. *Giuchici*, 118 Mich App at 263.

Here, defense counsel repeatedly stated that he wanted to introduce evidence of plaintiff's history of depression in order to address jurors' concerns in voir dire that mental illness does not just appear overnight, to rebut the prosecutor's comments during opening statements that defendant came up with the insanity defense "out of the blue," and to corroborate an assumption underlying his own expert's conclusions that defendant had been previously treated for depression. However, defendant's proposed evidence is clearly in support of his insanity defense. Moreover, defendant's argument that the psychiatrist was not acting as an expert is not persuasive to this issue, as the statute refers to "witnesses" in general. See *Giuchici*, 118 Mich App at 262. Defendant was required to give notice.

The Michigan Supreme Court has provided a test for assessing whether the trial court abused its discretion which has been applied both to the prosecution and to the defense in cases involving failure to list all witnesses:

> In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses . . . a district court should consider: (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. *Travis*, 443 Mich at 682.

Examining the record in light of the factors listed in *Travis*, the trial court did not abuse its discretion in excluding evidence that defendant had been treated for major depression two years prior to the shooting. In particular, we note that the psychiatrist had no clear memory of treating defendant or what the diagnosis was, and acknowledged that the billing statement's diagnosis of "major depressive disorder" could have been in reference to a substance abuse problem. There were no records to support the diagnosis. Moreover, the sole reason for the non-disclosure was defense counsel's erroneous interpretation of the statute. We find no abuse of discretion in excluding this evidence.

Defendant argues in the alternative that defense counsel's erroneous interpretation of the statute and subsequent failure to list this psychiatrist as a witness denied him the effective assistance of counsel. Here, defendant's expert witness testified that defendant was treated by a psychiatrist in 1992 for severe depression. This information was before the jury and it is unlikely that the psychiatrist's testimony would have resulted in any different finding by the jury. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Therefore, we find that defendant failed to overcome the presumption that he was afforded effective assistance of counsel.

IV

Defendant (by supplemental brief in propria persona) asserts that he was denied the right to a fair and impartial jury when three jurors that were previously excused from the jury during voir dire, nevertheless ended up serving on the jury. Although this issue is not preserved for appellate review, *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992), defendant's claim appears to be clearly contradicted by the record. None of the three jurors named by defendant remained on or returned to the jury.

V

Defendant (by supplemental brief in propria persona) says that he was denied a fair trial by the trial court's failure to provide the jury with defendant's jail records, a requested exhibit, during their deliberations. Because the contents of the jail records were testified to at trial and the trial court provided an opportunity for the jury to review the jail records before rendering their verdict, defendant has failed to show any prejudicial effect and was not denied a fair trial on this basis.

VI

Finally, defendant argues that his sentence of fifteen years to life for assault with intent to murder is invalid under the indeterminate sentencing statute. We agree.

MCL 769.9(2); MSA 28.1081(2) provides:

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. . . . The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

Defendant's sentence of fifteen years to life violates this unambiguous language. Where a court imposes a sentence that is partially invalid, the sentence is not "wholly reversed and annulled," but instead is to be set aside only "in respect to the unlawful excess." MCL 769.24; MSA 28.1094. Therefore, we remand to the trial court for resentencing.

Affirmed, but remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad

[1] We also note that a necessary component of a diminished capacity defense is that the defendant was mentally ill. *Pickens*, 446 Mich at 331. The jury rejected this determination when they rejected the guilty but mentally ill verdict available to them. Therefore, we find that defendant was not prejudiced by defense counsel's decision not to pursue the diminished capacity defense and was not denied effective assistance of counsel at trial.